



# Sales and Use Tax DOR Directive 94-3

Massachusetts  
Department of  
Revenue

1994

## Sales Tax on Taxable Tangible Personal Property When Combined With Tax Exempt Tangible Personal Property

### Notice:

DOR Directive 92-1, concerning the application of sales tax to gift baskets, cheeseboards, fruit baskets or other tangible personal property when combined and sold with tax exempt food, is hereby revoked and replaced with this Directive 94-3. The rules stated in this directive are applicable to sales occurring on or after July 1, 1994.

### Issue:

How does the sales tax apply to the sale of taxable tangible personal property and tax exempt tangible personal property combined or packaged together and then sold at retail as a single unit?

### Directive:

**General Rule.** When an item sold at retail contains a combination of both taxable tangible personal tax exempt tangible personal property ("combination unit"), the vendor should separately state the portion of the sales price of the taxable tangible personal property and collect sales tax on that portion of the sales price. The separately stated prices of the taxable property and the tax exempt property must reasonably reflect the value of each type of property. If the vendor does not separately state the portion of the sales price of the taxable property, tax will be calculated on the sales price of the entire "combination unit." The price of a "container" in which the tax exempt property is packaged ordinarily need not be separately stated, as it is also exempt. G.L. c. 64H, § 6(q). However, for this exemption to apply, the "container" must be utilitarian and essentially of no intrinsic value of its own.

**Exception.** If the taxable personal property is, in reality, "given away" in conjunction with the sale of tax exempt tangible personal property, the "combination unit" may be sold tax free. An item is considered a "give away" if the price, marketing, value, and desirability of the tax exempt property remains substantially the same with or without the item of taxable tangible personal property.

### Discussion of Law:

Massachusetts imposes a sales tax on sales at retail of tangible personal property unless otherwise exempt. G.L. c. 64H, § 2. The sale of food products for human consumption, other than "meals" sold by a restaurant, is exempt from the sales tax. The definition of food products includes candy, confectionery and gum. G.L. c. 64H, § 6(h). The sale of clothing, including footwear, up to a value of one hundred and seventy-five dollars of the sales price is exempt. G.L. c. 64H, § 6(k). Sales of containers in which tax exempt contents (for example, grocery items) are sold are tax exempt. See G.L. c. 64H, § 6(q)(2).

Sales of containers without contents are exempt when sold to persons who place contents in the container and sell the contents together with the container. See G.L. c. 64H, § 6(q)(1) and Letter Ruling 82-90. Also see G.L. c. 64H, § 6, for other sales tax exemptions.

The Supreme Judicial Court of Massachusetts has ruled that "certain transfers of tangible personal property (brochures and prizes) are not resales in the regular course of the transferor's business, but are incidental to the transferor's business, serving to facilitate the consummation of the principal transactions." See *Jan Co. Central, Inc. v. Commissioner of Revenue*, 405 Mass. 689 (1986) and the cases cited therein. Similarly, the inclusion of a small prize sold in a box of cereal or a costume jewelry pin sold on a dress is incidental to the sale of the exempt food or clothing. Such "give away" items are, in fact, being consumed by the party combining the items, which is, therefore, obligated to pay sales tax on them at the time of its purchase.

However, in most retail sales involving "combination units," that is, both taxable tangible personal property and tax exempt tangible personal property sold for a single price, the taxable property is not given away. A question then arises as to whether the entire sales price of the combination unit is taxable or what portion, if any, of the sales price of such items is taxable. DOR Directive 92-1 applied mechanical a "10% rule," i.e., if a vendor did not separately state the portion of the sales price which pertained to the taxable tangible personal property, the entire package was taxable unless the sales price of the taxable property was less than ten percent of the total sales price. The 10% rule was an attempt to establish an easy test for identifying items incidental to a sale. Upon further consideration, however, the Department has concluded that the proper analysis is whether the taxable property is actually sold or whether, more realistically, it is given away. When an item is given away, the tax is paid by the party who purchases the taxable items and then packages the combination for retail sale. With respect to sales occurring on or after July 1, 1994, the Department revokes DD 92-1 to the extent it is inconsistent with the rules set forth in this Directive 94-3.

### Examples:

The examples below are meant to be illustrative and not exhaustive. The following items sold for a single price as a "combination unit" are taxable:

- Easter Basket with stuffed animal and candy
- Coffee grinder with a pound of coffee
- Wooden cheeseboard with cheese and crackers
- Coffee mug or candy dish filled with jelly beans

- Baseball cards with gum
- Matching umbrella and gloves packaged together and sold as a set.

The following items generally may be sold tax free under the "container" exemption:

- Bushel basket holding apples sold at a farm stand
- Reusable mason jar containing preserves
- Circular tin containing holiday fruitcake or cookies
- Purely functional (utilitarian) basket containing fresh fruit sold as a gift item.

The following combinations sold for a single price generally may be sold tax free under the above rule. The party combining the "give away" item with the tax exempt property must pay tax on its purchase of the taxable property given away.

- Small prize such as a whistle included in a box of cereal
- Mini-coloring books included in children's frozen dinners
- Decorative pin on a dress
- Matching pocketbook sold with child's dress
- Plastic forks included in an otherwise nontaxable sale of a "party platter" by a supermarket.



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